IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CRIMINAL NO. 01-629-01,03**
	:	
HITHAM ABUHOURAN,	:	
a/k/a "Steve Houran"	:	
AKTHAM ABUHOURAN,	:	
a/k/a "Tony Houran"	:	

M E M O R A N D U M

WALDMAN, J. **November 26, 2002**

Defendants are charged in a nineteen-count indictment arising from their participation in an elaborate conspiracy spanning many years to commit mail fraud and obstruct justice.[1] The purpose of the conspirators as alleged was to thwart the prosecution of the Abuhouran brothers in an earlier trial on charges of defrauding the Bank of the Brandywine Valley (BBV) and to obtain funds to finance their defense and flight from the United States in the event of conviction.[2]

Defendant Hitham Abuhouran is charged with one count of conspiracy in violation of 18 U.S.C. § 371, twelve counts of mail

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1. The government uses the term obstruction of justice in a colloquial or literal, rather than, legal sense. There is no allegation that defendants conspired to violate 18 U.S.C. § 1510 or § 1512, although it appears from what is alleged that they may have collaborated to violate § 1512(b)(1). Rather, the government charges that defendants conspired to "obstruct justice" specifically by conspiring to suborn perjury in violation of 18 U.S.C. § 1622, to make false statements in violation of 18 U.S.C. § 1001 and to flee before sentencing in violation of 18 U.S.C. § 3146(a)(1).

2. The Abuhouran brothers and several others were indicted in October 1995 on numerous charges stemming from the February 1992 insolvency of the Bank of the Brandywine Valley (BBV). Hitham Abuhouran pled guilty to all charges. Adham and Aktham Abuhouran were convicted on 17 of the 18 counts after a six-week trial in the fall of 1996.

fraud in violation of 18 U.S.C. § 1341, one count of bank fraud in violation of 18 U.S.C. § 1344 and three counts of subornation of perjury in violation of 18 U.S.C. § 1622. Defendant Aktham Abuhouran is charged with one count of conspiracy in violation of 18 U.S.C. § 371 and three counts of mail fraud in violation of 18 U.S.C. § 1341.

Presently before the court is defendant Aktham Abuhouran's Motion to Dismiss Indictment and for Other Relief in which defendant Hitham Abuhouran has joined. Defendants seek a dismissal of the charges against them on numerous grounds and, in lieu thereof, a severance of counts and the striking of certain language from the indictment.

Multiple Conspiracies

Defendants contend that Count One inappropriately charges a single conspiracy while alleging facts which show multiple distinct conspiracies. Defendants rely on Kotteakos v. U.S., 328 U.S. 750 (1946). In that case the Court held that a conviction could not stand where a variance between the indictment which charged one conspiracy and proof at trial which demonstrated multiple conspiracies prejudiced the defendant's rights. This principle is well established. See, e.g., U.S. v. Smith, 82 F.3d 1261 (3d Cir. 1996); U.S. v. Barr, 963 F.2d 641, 648 (3d Cir. 1992); U.S. v. Salmon, 944 F.2d 1106, 1116 (3d Cir. 1991); U.S. v. Kelly, 892 F.2d 255, 258 (3d Cir. 1989).

To determine whether there is an impermissible variance between the proof and the indictment, a court determines whether

the conspirators shared a common goal; looks at the nature of the scheme to determine whether "the agreement sought to bring about a continuous result which could not be sustained without the continued cooperation of the conspirators"; and, looks at the extent to which the various participants overlapped in their dealings. U.S. v. Russell, 134 F.3d 171, 182 (3d Cir. 1998).[3] This principle protects a defendant from conviction by a jury that was "unable to separate offenders and offenses and easily could have transferred the guilt from one alleged co-schemer to another." U.S. v. Camiel, 689 F.2d 31, 38 (3d Cir. 1982).

Until the government has presented evidence, the court cannot definitively determine whether the proof varies from the indictment. On its face, however, the indictment alleges the existence of a single conspiracy in which defendants worked together over the same period of time fraudulently to obtain funds and to thwart the prosecution of the BBV action. Although defendant Aktham Abuhouran is not charged with participation in every aspect of the fraudulent conduct alleged in the indictment, the government represents that the evidence will show he "was

3. It is not necessary that each defendant commit acts in furtherance of every objective. See U.S. v. Smith, 82 F.3d 1261, 1270 (3d Cir. 1996); U.S. v. Carr, 25 F.3d 1194, 1201-02 (3d Cir. 1994).

aware of and benefitted from even those parts of the conspiracy which he did not personally execute."[4]

There is no basis on the record presented to dismiss the conspiracy charge in Count One because of a variance between the proof and the indictment.

Absence of an Unlawful Objective

Defendants contend that the government has not sufficiently alleged an unlawful objective of the conspiracy. They correctly note that allegations that funds were utilized partially to pay attorneys fees in the prior BBV prosecution or to post bail in that case do not establish an illicit purpose. Defendants further argue that even if some of the activities alleged were undertaken for the illegal purpose of thwarting the BBV prosecution, other alleged activities took place before the Abuhouran brothers were indicted in the BBV case.

The indictment clearly alleges that the objectives of the conspiracy were to obstruct justice in the prosecution of the BBV case and to steal funds for use, inter alia, in facilitating defendants' planned flight from the United States in the event of a conviction. That defendants' purpose for committing fraud may have been in part to obtain funds to engage in otherwise lawful

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4. The indictment contains three conspiracy counts. Movants, a third brother and three of nine other defendants are charged in Count One. The government represents that it was careful to charge together in a single conspiracy only those who endeavored to achieve common illegal objectives with knowledge of the full nature of the conspiracy.

activities would not alter the fact that the alleged objective of the conspiracy to perpetrate fraud is an unlawful objective.

As to defendants' contention that some of the alleged activity took place prior to the BBV indictment, the government represents that it will present evidence that the Abuhouran brothers were aware of the BBV criminal inquiry at an early stage and were motivated as early as 1994 to obtain funds by fraud to prepare for the anticipated prosecution.

The indictment adequately sets forth unlawful objectives of the alleged conspiracy.

Double Jeopardy

Defendants argue that the Double Jeopardy clause of the Fifth Amendment bars the instant prosecution because the purpose of the alleged conspiracy was concealment of the conduct at issue in the BBV case or, alternatively, because the alleged fraudulent acts were "part and parcel of the same conspiracy as pled in the BBV case."

Defendants rely on Krulewitch v. U.S., 336 U.S. 440 (1949) and Grunewald v. U.S., 353 U.S. 391 (1957) for the proposition that a conspiracy to conceal the activities of an earlier conspiracy does not constitute a new crime. In Krulewitch, the Court held that statements made as part of an effort to conceal a conspiracy after its criminal objectives had been attained were not admissible under the co-conspirator exception to the hearsay rule. In Grunewald, the Court held that an agreement to conceal a conspiracy cannot be deemed part of the

conspiracy and thus cannot extend its duration for statute of limitations purposes.

The government has not alleged that any act was undertaken for the purpose of concealing or preventing detection of the BBV crime and the acts allegedly undertaken to thwart the prosecution were not part of any conspiracy alleged in the BBV case. The government fairly characterizes defendants' contention as one that not only may acts of concealment not be part of a completed conspiracy but, even if criminal, may never be charged at all. This was not the holding of Krulewitch or Grunewald.

The alleged conspiracy to commit fraud, in part to finance a criminal defense, and to obstruct justice by suborning perjury and fleeing was not encompassed in the BBV case. None of the offenses alleged in the pending superseding indictment were charged in the BBV case. Rather, information regarding subsequent criminal activity was presented in connection with the revocation of defendants' bail in the BBV case and was considered during sentencing in the BBV case. Such uses of uncharged criminal conduct do not prevent later prosecution for that conduct.[5] The Supreme Court has "specifically rejected the claim that double jeopardy principles bar a later prosecution or punishment for criminal activity where that activity has been

5. That defendants may have been brought before the court for revocation hearings by means of a warrant would not alter the fact that they were charged with violating the terms of their release and not arrested on new substantive criminal charges arising from the violative conduct.

considered at sentencing for a separate crime." Witte v. U.S., 515 U.S. 389, 398 (1995). See also U.S. v. Gibbs, 190 F.3d 188, 215-16 (3d Cir. 1999).

Insufficiency of the Evidence

Defendants argue, in one sentence, that the evidence presented to the grand jury was insufficient to sustain the charges. An indictment may be dismissed pursuant to Fed. R. Crim. P. 12(b)(2) if the facts alleged therein fail to satisfy the essential elements of the offense charged. See U.S. v. Panarella, 277 F.3d 678, 685 (3d Cir. 2002).

Dismissal of an indictment pursuant to Rule 12(b)(2), however, "may not be predicated upon the insufficiency of the evidence to prove the indictment's charges." United States v. DeLaurentis, 230 F.3d 659 (3d Cir. 2000).

Statute of Limitations

Defendants contend that the charges against them are barred by the statute of limitations. With respect to the conspiracy charge, defendants rely on the Supreme Court's holding in Grunewald. That reliance is misplaced. As noted, the Court in Grunewald held that steps taken to conceal a conspiracy after its criminal objectives have been accomplished are not overt acts that extend the conspiracy for statute of limitations purposes. The government, however, has not charged that defendants' alleged efforts to obstruct justice and commit fraud were part of a conspiracy in the BBV case. The government has alleged a distinct criminal conspiracy with the objectives of thwarting

prosecution of the BBV case and financing through fraud defendants' defense in the BBV case and planned flight from the country. Assuming that the last overt act in furtherance of the conspiracy took place on August 14, 1997, the date defendants allegedly made a final request to have stolen funds wired to Jordan and attempted to flee to Jordan, the indictment would have been filed within five years of that time.[6]

Defendants argue that the applicable statute of limitations for the mail fraud charges is five years pursuant to 18 U.S.C. § 3282. If so, these charges would be untimely since the mail fraud offenses concluded on March 7, 1997 and the indictment was returned on April 25, 2002. The mail fraud charges, however, are covered by 18 U.S.C. § 3293. The charges allege violations of 18 U.S.C. § 1341 involving various financial institutions. Title 18 U.S.C. § 3293(b) provides that "[n]o person shall be prosecuted, tried, or punished for a violation of, or a conspiracy to violate section 1341 or 1343, if the offense affects a financial institution, unless the indictment is returned or the information is filed within 10 years after the

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6. The government alleges that the conspiracy continued through the return date of the superseding indictment based on "defendants' efforts to hold onto the $185,000 of stolen PNC [Bank] money which was wired to Jordan in August 1997." If the government is suggesting that the limitations period runs throughout the period a defendant retains ill gotten gains, the court is dubious. If the government has evidence that defendants affirmatively engaged in further unlawful acts to defeat efforts by a victim to recover stolen funds, this has not been made clear. In any event, the conspiracy charge was timely filed.

commission of the offense." The instant charges were filed well within the limitations period of ten years.

Speedy Trial

Defendants argue that the delay from the time the government first uncovered new fraudulent conduct in 1997 until the filing of the indictment in April 2002 has violated their right to a speedy trial. Defendants cite to the Sixth Amendment, the Due Process Clause of the Fifth Amendment and Fed. R. Crim. P. 48(b) which provides that a court may dismiss an indictment "[i]f there is unnecessary delay in presenting the charge to a grand jury." or "in bringing a defendant to trial."

Defendants' claim of excessive pre-indictment delay is governed by the Fifth Amendment Due Process Clause. See U.S. v. Lovasco, 431 U.S. 783, 789 (1977)("as far as the Speedy Trial Clause of the Sixth Amendment is concerned, [pre-indictment] delay is wholly irrelevant").[7] To demonstrate a violation of their due process rights, defendants must show that the government intentionally delayed to gain a tactical advantage over the defendants and actual prejudice to the defense as a result. See U.S. v. Marion, 404 U.S. 307, 325 (1971); U.S. v.

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7. Defendants suggest that they were arrested for some of these new crimes in 1997 when their bail was revoked and they were placed in custody pending sentencing in the BBV case. That defendants' bail was revoked in the BBV case in part because of conduct ultimately giving rise to the instant charges or that a warrant was utilized to ensure their presence before the court for revocation proceedings would not alter the fact that defendants were in custody in connection with the BBV case. The investigation into the new crimes was ongoing and no charges were filed until April 25, 2002 at which time defendants' Sixth Amendment right to a speedy trial attached.

Ismaili, 828 F.3d 153, 166 (3d Cir. 1987); U.S. v. Holtz, 1994 WL 750674, *2 (E.D. Pa. Feb. 6, 1994).

Defendants contend that they have been prejudiced by the pre-indictment delay because it will be more difficult for them to obtain the necessary witnesses and documentary evidence for their defense. They also argue that the passage of time "will inevitably create memory problems for witnesses" and state that certain potential witnesses have died or left the country. Defendants do not identify any specific witness who has died or left the country. The government represents that it "is unaware of any material witness who has died, nor of any witness who has left the United States since the completion of the criminal conduct," and that all acquired witness testimony and documentary evidence has been preserved and made available to the defense in discovery.

To demonstrate prejudice, a defendant must show that "the witness would have been available at an earlier time, would have testified for the defendant, and would have aided the defense." Holtz, 1994 WL 750674, *3 (quoting 2 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure 428 (1984)). As to a deceased witness, a defendant must also show that the particular witness died before the indictment was returned. Id. A conclusory statement that unspecified potential witnesses have died or left the country is insufficient to support a showing of prejudice necessary to sustain a due process challenge.

Moreover, defendants do not contend, let alone show, that there was intentional delay by the government to gain tactical advantage. The government represents that the delay is attributable to the "painstaking process" of unraveling defendants' many fraudulent schemes and that the lengthy period of investigation "was dictated only by the scale of the offenses." The Supreme Court has recognized the potential for lengthy legitimate delay "in those cases in which a criminal transaction involves more than one person or more than one illegal act." Lovasco, 431 U.S. at 793.

The government has charged a myriad of criminal activities spanning many years. Although some of the new criminal activity had come to light in 1997, the investigation was ongoing and much of the activity now charged had not been discovered. The government actively pursued this case between 1997 and 2002, issuing hundreds of subpoenas and conducting extensive grand jury proceedings. There is no showing whatsoever that the pre-indictment delay in this case was due to anything other than the government's legitimate need thoroughly to conduct a very complex investigation involving numerous transactions.[8]

Venue

8. Given the reasons for delay, the lack of a showing of prejudice, the failure of defendants to assert any right to a speedy trial until filing the instant motion in October 2002 and their incarceration throughout the pertinent period on a sentence imposed in another case, defendants could not establish a constitutional violation even if the Sixth Amendment were applicable. See U.S. v. Dent, 149 F.3d 180, 184 (3d Cir. 1998).

Defendants argue that the court should dismiss the indictment for improper venue. In a conspiracy case, "venue can be established wherever a co-conspirator has committed an act in furtherance of the conspiracy." U.S. v. Perez, 280 F.3d 318, 329 (3d Cir. 2002). The conspiracy count contains allegations of numerous overt acts that occurred within this district. Defendants suggest that the overt acts providing a basis for venue "were not bona fide, did not bear a causal connection to the conspiracies, and were not, in fact, in furtherance of the conspiracy." In fact, an alleged objective of the conspiracy was to obstruct the prosecution of a case in this district and overt acts undertaken to achieve that end are at the heart of the conspiracy charge.

Venue is also proper as to the substantive charges. An offense involving use of the mails may be prosecuted "in any district from, through, or into which such commerce, mail matter, or imported object or person moves." 18 U.S.C. § 3237. Each of the substantive mail fraud charges includes an allegation of a mailing from within this district. The substantive bank fraud charge includes an allegation of a scheme to defraud a bank located in this district. The subornation of perjury charges include allegations that defendants procured perjured testimony from witnesses who appeared in the BBV trial in this district.

Severance of Charges

Defendant Aktham Abuhouran contends that because he is not charged in the subornation of perjury counts, he would be

substantially prejudiced by the introduction of evidence on these charges and the corresponding overt acts in the conspiracy count. He suggests that "there should be a separate trial for such counts and/or aspects of such counts."

There is a preference for joint trials of defendants who have been indicted together. See Zafiro v. U.S., 506 U.S. 534, 533 (1993). A severance under Fed. R. Crim. P. 14 should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Id. at 539. "Rule 14 does not require severance even if prejudice is shown" as "less drastic measures such as limiting instructions often will suffice to cure any risk of prejudice." Id. at 538-39. See also U.S. v. DiPasquale, 740 F.2d 1282, 1294 (3d Cir. 1984). Prejudice does not arise simply because all of the evidence presented is not germane to all charges against each defendant or may be more damaging to some defendants than others. See U.S. v. Console, 13 F.3d 641, 655 (3d Cir. 1993), cert. denied, 511 U.S. 1076 (1994).

The allegations of subornation of perjury are integral to the charged conspiracy. This conduct was allegedly undertaken in furtherance of the conspiracy with Aktham Abuhouran's knowledge while he was a participant. In any event, he has cited no pertinent authority for the proposition that various "aspects" of a criminal count may be severed and tried separately.

Movant has not demonstrated substantial prejudice, or any risk of prejudice that cannot be adequately addressed with standard prophylactic jury instructions.

Surplusage

A court has discretion to strike surplusage from an indictment upon motion from a defendant. See Fed. R. Crim. P. 7(d); U.S. v. Figueroa, 900 F.2d 1211, 1218 (8th Cir. 1990), cert. denied, 110 S. Ct. 3228 (1990); U.S. v. Yeaman, 987 F. Supp. 373, 376-77 (E.D. Pa. 1997). "Language is properly included in an indictment if it pertains to matters which the government will prove at trial. These matters need not be essential elements of the offense if they are in a general sense relevant to the overall scheme charged." U.S. v. Bulei, 1998 WL 544958, *3 (E.D. Pa. Aug. 26, 1998). See also Yeaman, 987 F. Supp. at 376-77.

Defendants contend that the following portions of the indictment are surplusage and should be stricken: "the description of the prior [BBV] prosecution in Count 1"; statements that the aim of the conspirators was "to frustrate the effort of the United States government to prosecute and incarcerate the Houran brothers in connection with the BBV case" and "to finance the Houran brothers' defense in the BBV case"; a "reference to the family's past living relationships and the Defendant's [Aktham Abuhouran's] prior address"; a "reference to the use of funds to pay for counsel"; and, a statement that some

of the fraudulently obtained funds were used to post bail in the BBV case.

Some explanation of the BBV case is essential to understand the alleged objectives of the conspirators to obstruct justice in that case by suborning perjury and to flee to avoid confinement upon conviction. This pertains directly to what the government will prove at trial.

The "reference to the family's past living relationships" and a defendant's "prior address" is actually an integral part of a description of one of the alleged loan frauds the government intends to prove at trial.

Proof of motive is proper. The government may properly show at trial that defendants were motivated to commit fraud by the need for funds to pay counsel and post bail in the BBV case. Insofar as the government charges that this was a purpose of the alleged conspiracy, a conspiracy can be shown by proof of an agreement to achieve a lawful purpose by unlawful means. An agreement to obtain funds to post bail and engage counsel by means of fraud would constitute an unlawful conspiracy.[9]

Defendants' arguments for dismissal of the charges against them are unavailing. They have made no showing that the other relief sought is appropriate. Accordingly, defendants' motion will be denied. An order to that effect will be entered.

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9. It will be made clear to the jury that there is absolutely nothing unlawful or inappropriate about posting bail or retaining counsel.

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O R D E R

AND NOW, this day of November, 2002, upon consideration of the Motion to Dismiss Indictment and for Other Relief of defendant Aktham Abuhouran (Doc. #88) in which defendant Hitham Abuhouran has joined, and the government's response thereto, consistent with the accompany memorandum, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

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JAY C. WALDMAN, J.